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No. 96-1993

In The

Supreme Court of the United States

October Term, 1996

DOUGLAS NELSON CARLISLE,

Petitioner,

v.

LARRY ROBINETT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent files this brief in opposition and requests that the Court deny the petition for writ of certiorari.

STATEMENT OF JURISDICTION

Forty copies of a petition for writ of certiorari must be filed with the Clerk of this Court within 90 days after entry of judgment. Rules 12.1, 13.1. All copies of the petition must conform to the format of Rule 33.1. The petition for writ of certiorari in this case was due March 13, 1997. One copy of the petition was mailed on March 13, 1997, but it was not prepared as required by Rule 33.1. The remaining 39 copies, also not prepared as required by Rule 33.1, were forwarded by Federal Express on March 15, 1997 and received by the Clerk of this Court on March 17, 1997. The petition is, thus, untimely. Respondent objects.

STATEMENT OF THE CASE

Procedural History. This is a civil rights action. It was filed by a convicted murderer and drug dealer who was shot while attacking a police officer with deadly force. Although criminally convicted of assaulting a police officer and illegally possessing a hand gun, petitioner Douglas Nelson Carlisle ("Carlisle") sued officer Larry Robinett ("Robinett") in state court under 42 U.S.C. §1983 for purportedly violating his constitutional rights. Officer Robinett filed a motion for summary judgment

based on qualified immunity, which the trial court denied. Officer Robinett immediately appealed the judgment to the Court of Appeals, Second Court of Appeals District of Texas. After considering the evidence and its reasonable inferences in the light most favorable to petitioner, the court of appeals reversed the trial court's judgment, finding officer Robinett entitled to qualified immunity as a matter of federal law. The opinion was not originally designated for publication. Officer Robinett filed a motion to publish because of the dearth of state case law interpreting §1983 and qualified immunity. The motion was granted and the opinion exonerating officer Robinett was published at 928 S.W.2d 623 (Tex. App. – Fort Worth 1996, writ denied). (All citations to the court of appeals decision will be to the opinion attached as Appendix B to the petition for writ of certiorari.) Petitioner asked for a rehearing before the court of appeals. The request was denied. The Texas Supreme Court similarly denied petitioner's application for writ of error.

Fact Statement. In the early morning hours of January 29, 1993, police officer Larry Robinett and several other officers from the North Texas Drug Enforcement Task Force executed a search warrant for illegal drugs at 2142 Avenue E, Wichita Falls, Texas. The search warrant had been issued by justice of the peace Janice Sons. Police intelligence had determined that drug suspects inside the house could be armed and dangerous. When the Task Force banged on the door and loudly demanded that it be opened, the occupants of the house refused to peaceably respond. After repeatedly shouting "police, search warrant", the Task Force battered down the door. Officer

Robinett was the first officer to enter the residence. Officer Albert Chapa followed. There were no lights on at the residence, so the officers carried a flashlight in one hand and a police weapon in the other hand. As officer Robinett scanned the room with his flashlight, he observed Carlisle on a couch. Officer Robinett was wearing a uniform with "POLICE" emblazoned on both the front and back of his jacket. Officer Robinett shouted "police" and ordered Carlisle to "get down on the floor". Instead of obeying the officer's command, Carlisle pointed a handgun directly at officer Robinett's chest and then cocked the trigger. In reasonable fear of his life, officer Robinett backed away and began firing in self defense. He was successful in disabling Carlisle and preventing return fire, thus saving his own life. Carlisle was shot four times. Emergency medical treatment was immediately rendered to Carlisle at the scene. He was then transported by ambulance to Wichita General Hospital.

Carlisle was convicted, based on these facts, for aggravated assault of a peace officer and illegal possession of a firearm by a felon. The convictions have been upheld on appeal, *Carlisle v. State*, No. 02-95-211-CR (Tex. App. – Fort Worth 1996), and a criminal mandate has been issued. Carlisle had previously been convicted of murder and delivery of a controlled substance, cocaine.

Officer Robinett believed he had probable cause to search the residence located at 2142 Avenue E, Wichita Falls, Texas. He relied on the search warrant issued by a local magistrate. At no time did officer Robinett use any force which he believed to be excessive or unreasonable under the circumstances. These facts are buttressed by the expert opinion of Curtis Harrelson, Chief of Police for

the City of Wichita Falls. Chief Harrelson has 37 years of training and experience as a police officer. Based upon this expertise, it is Chief Harrelson's opinion that officer Robinett acted within the acceptable, reasonable and lawful parameters of proper police training and conduct in Texas. It is his further opinion that officer Robinett's acts were both necessary and justified. Carlisle offered no expert testimony in rebuttal.

Correction of Misstatements in the Petition. In his petition for writ of certiorari, Carlisle cites and discusses the standards of official immunity under state law. (Petition at 9). This is a misstatement of law. Carlisle sued officer Robinett under a federal statute, 42 U.S.C. §1983, for violating his federal civil rights. Officer Robinett asserted the federal defense of qualified immunity in his motion for summary judgment. Federal, not state, law therefore governs this case. *Borough of West Mifflin v. Lancaster,* 45 F.3d 780, 790 (3rd Cir. 1995); *USX Corp. v. Champlin,* 992 F.2d 1380, 1385 (5th Cir. 1993); *Reese v. Andrews,* 926 F.2d 494, 500 (5th Cir. 1991).

REASONS FOR DENYING THE WRIT

I. Officer Robinett is entitled to qualified immunity.

Qualified immunity is a substantive right belonging to police officers. *Schultea v. Wood,* 47 F.3d 1427, 1430 (5th Cir. 1995). Its principal purpose is to shield officials not only from liability but also from defending against a lawsuit. *Span v. Rainey,* 987 F.2d 1110, 1111 (5th Cir. 1993). "Qualified immunity is in part an entitlement not to be forced to

litigate the consequences of official conduct. . . . " *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985).

Police officers are immune if they could have reasonably believed their actions to be lawful in light of clearly established law and the information the officers possessed. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *Johnson v. City of Houston*, 14 F.3d 1056, 1059 (5th Cir. 1994). Even if law enforcement officials err, they are entitled to qualified immunity if their decision was reasonable, albeit mistaken. *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1400, 128 L.Ed. 2d 73 (1994). Qualified immunity has therefore been recognized to protect all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. at 229. It operates as a cloaking device from personal liability for officers who act in an objectively reasonable manner. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain and rapidly evolving." *Graham v. Conner*, 490 U.S. 386, 396-97 (1989). Determining whether an officer has crossed the constitutional line must be made without the luxury of hindsight:

> . . . we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable'

> action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. *Stroik v. Ponseti*, 35 F.3d 155, 158-59 (5th Cir. 1994), *quoting*, *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992).

A. The use of deadly force was justified.

Applying these standards, federal courts have consistently held that an officer under attack may employ deadly force to defend himself. *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992) (officer entitled to qualified immunity for shooting and killing driver of truck who was driving truck straight at officer, showing no sign of attempting to stop or driving around him); *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985) ("If Young's movements gave Olsen cause to believe there was a threat of serious physical harm, Olsen's use of deadly force was not a constitutional violation."); *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993) (when suspect sped toward officer with car, officer was entitled to qualified immunity in shooting of suspect to prevent his own death or great bodily harm); *Liebenstein v. Crowe*, 826 F.Supp. 1174 (E.D. Wis. 1992) (officers who shot and killed heavily armed man in front of his home were entitled to qualified immunity where man had been firing in the air and in the direction of concealed police officers). The use of deadly force, thus, is not a constitutional violation when an assailant gives an officer cause to believe that there is a threat of serious physical harm to the officer or to others. To be shielded by qualified immunity when employing deadly force, a police officer need only show that he reasonably feared a threat to his life or the life of others.

Conversely, there is no right which guarantees protection to an individual from the use of force during or following his attack on a police officer.

In *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), the Fifth Circuit held that a police officer was entitled to qualified immunity in a §1983 action where the officer shot and killed a robbery suspect. Responding to a radio call for the robbery of a convenience store, the police officer in *Reese* spotted the suspects' car and began to give chase. During the chase, the suspects threw out of the car window what appeared to be parts of a cash register. The suspects' car eventually spun out of control and the police car pulled alongside the suspects' car. Kneeling behind his open car door, the police officer instructed the suspects to raise their hands. After initially complying, the suspect in the front passenger seat reached down below the seat with his left hand. The officer again commanded the suspects to raise their hands and again the suspect in the passenger seat raised and then lowered his hand. After this happened several times, the officer, fearing for his safety, shot the suspect once in the head, killing him. The officer later found that the suspect was, in fact, unarmed. The officer filed for summary judgment based on qualified immunity, which the district court denied. On appeal, the Fifth Circuit concluded that "a reasonable officer could well fear for his safety and that of others nearby. He could reasonably believe that [the suspect] had retrieved a gun and was about to shoot." *Id.* at 501. For this reason, the "officer [was] justified in using deadly force to defend himself and others around him." *Id.* at 501, and the officer was entitled to summary judgment as a matter of law.

The Fifth Circuit in *Stroik v. Ponseti*, 35 F.3d 155 (5th Cir. 1994) again found qualified immunity where an officer feared for his safety and that of others nearby. In that case, police officers heard a police radio broadcast concerning a series of armed robberies. The message indicated that four persons were suspected of committing the robberies, that the suspects were driving a blue van, and that two of the suspects were black and two were white. The broadcast further indicated that the suspects were armed. The officers joined in pursuit when observing two other police vehicles following a blue van at high speed. The blue van eventually lost control and ran into a curb. One suspect began to flee on foot. One of the officers also observed a black male and a white female exiting the van through the side door. The black male, situated behind the white female with his left had around her waist, pointed a gun at the police officer. The officer immediately fired his gun 7 to 9 times, killing the black male and wounding the white female. It was later determined that the white female had been carjacked by the two black males and taken as a hostage. The former hostage sued the police officer and others for violating her civil rights. Upon a jury trial, verdict was rendered in favor of the former hostage. The officer appealed based on qualified immunity. The appeal was decided by 2 crucial facts: [1] the assailant had pointed a gun at the officer and [2] the officer's life was actually in jeopardy when he shot. *Id.* at 159. Given these facts, the appellate court concluded that the officer had "probable cause to believe that the suspect[s] pose[d] a threat of serious physical harm." *Id.* at 159. Because the officer could have reasonably believed that the suspects posed an imminent, deadly threat, the

Fifth Circuit held that the officer was justified in using deadly force and granted qualified immunity.

The facts in this case establish that officer Robinett entered the residence pursuant to a search warrant. He was aware that drug suspects could be armed and dangerous. Carlisle was immediately uncooperative by disobeying officer Robinett's commands. Within seconds, Carlisle's resistance escalated to a level of deadly force. Faced with the threat of his own life, officer Robinett acted reasonably. When the suspect refused to "get down on the floor" as ordered, and instead, cocked a gun pointed directly at officer Robinett's chest, officer Robinett was justified in returning the use of deadly force. *See Tennessee v. Garner*, 471 U.S. 7, 31 (1985) (deadly force may be used if a suspect threatens an officer with a weapon). There was no constitutional violation because officer Robinett believed that Carlisle, like the assailants in *Reese* and *Stroik*, posed an imminent, deadly threat.

B. The entry into the residence was reasonable.

Qualified immunity likewise protects officer Robinett during his entry into the residence where Carlisle was staying. Robinett recited in his affidavit that he believed he had probable cause to enter the residence of 2142 Avenue E and entered pursuant to a search warrant. The warrant was executed shortly after midnight when it was extremely quiet. Robinett testified that the officers yelled and screamed "Police, search warrant" before and as the door was struck. The shout was loud enough to be heard within a one-block area. The door was hit with a battering ram nearly a dozen times which "practically shook

the house." This entry was made because the officers feared, not only for their own safety, but that the occupants would destroy the narcotics prior to entry. These facts are uncontroverted. And police chief Curtis Harrelson, based on 37 years of law enforcement experience, opined that officer Robinett acted within the "acceptable, reasonable, and lawful parameters of proper police training and conduct." This opinion evidence, too, is uncontroverted. The court of appeals therefore concluded "that it was objectively reasonable for Robinett to assume that the occupants were sufficiently apprised of his identity and purpose for entry given the loudness of the police officer's announcement and the length of time it took the officers to enter the building." (op. at B-13).

This conclusion is consistent with *Wilson v. Arkansas*, ___ U.S. ___, 115 S.Ct. 1914, 131 L.Ed. 2d 976 (1995). In that case police officers armed with both search and arrest warrants entered the residence of a suspect through an unlocked screen door. The officers announced their presence while they were entering. Once inside, the officers seized drugs, a gun, ammunition, and found the suspects flushing marijuana down the toilet. Before trial, one of the suspects sought to suppress the evidence seized because the officers failed to "knock and announce" before entering the home. The trial court denied the suppression motion, and subsequently, the suspect was convicted. The Arkansas Supreme Court affirmed the conviction, rejecting the suspect's argument that the Fourth Amendment requires officers to knock and announce prior to entering the residence. This Court granted certiorari to determine whether the knock-and-announce principle forms part of the Fourth Amendment.

In evaluating the scope of this right, the Court looked to the traditional protections against unreasonable searches and seizures afforded by early common law at the time of the framing of the Bill of Rights. The common law of England held that a person is entitled to notice before law enforcement enters a residence, and if notice is given, it is presumed that the occupant will obey. *Id.* at ___, 115 S.Ct. at 1917. Although common law endorsed the practice of announcement, the Court found that the principle was not an inflexible rule requiring announcement under all circumstances. Instead, the principle of announcement is simply one of many factors to be considered under the Fourth Amendment in assessing a search's reasonableness. Countervailing law enforcement factors, *e.g.*, the threat of physical harm to police, the fact that an officer is pursuing an escaped arrestee, reason to believe that evidence might be destroyed if advance notice were given, may establish the reasonableness of an unannounced entry. *Id.* ___, 115 S.Ct. at 1918-19. The Arkansas police officers in that case contended that the search was reasonable under the Fourth Amendment and the judgment below should be affirmed because a prior announcement would have placed them in peril and given the suspect opportunity to destroy the narcotics evidence. These facts, unfortunately, were not in the record and the Court remanded the case to develop findings of fact, noting "[t]hese considerations may well provide the necessary justification for the unannounced entry in this case." *Id.* at ___, 115 S.Ct. at 1919.

The record here evidences, and the court of appeals found, the officers had been warned that the occupants of

the house could pose a serious danger and that the officers feared destruction of the narcotics could occur. (op. at B-2, 11 n. 5). Either one of these factors would have justified a no-knock entry. *Richards v. Wisconsin*, 520 U.S. ___, 117 S.Ct. ___, 187 L.Ed. 2d 615 (1997). Unlike an unlocked screen door in *Wilson*, the officers in this case encountered a door so secured that it took a battering ram nearly 12 attempts to sufficiently enter. This drug raid was also executed in the quiet of the night. When the door was first struck, the officers yelled "Police, search warrant" loud enough to be heard within a one-block area. Given these circumstances, the appellate court found that the occupants of the house were sufficiently apprised of the identity of the police and purpose for entry. (op. at B-13). The entry was reasonable under the Fourth Amendment.

C. The search warrant was facially valid.

Carlisle claims that the search warrant was based on a "bare bones affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable". While an insufficient warrant, itself, can constitute grounds for a §1983 claim, it has little bearing on the affirmative defense of qualified immunity by officers effecting the warrant. So held the court of appeals (op. at B-11). "[A] warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *U.S. v. Leon*, 468 U.S. 879, 922 (1984), *quoting*, *U.S. v. Ross*, 456 U.S. 798, 823 n. 32 (1982). It is absurd to argue that the subsequent invalidation of a warrant automatically

destroys an officer's immunity. The propriety of a warrant and the qualified immunity of an officer are two, separate issues. *See Malley v. Briggs*, 475 U.S. 335 (1986); *Soares v. State of Connecticut*, 8 F.3d 917 (2nd Cir. 1993); *Bagby v. Broadhaver*, 98 F.3d 1096 (8th Cir. 1996). It is equally absurd to suggest that officer Robinett had an obligation to independently review the magistrate's determination of probable cause, particularly when officer Robinett had nothing to do with obtaining the warrant. An officer charged with executing a facially valid court order has no choice but to do so. *Mays v. Sudderth*, 97 F.3d 107, 113 (5th Cir. 1996). Police officers "should not be required to make the Hobson's choice between disobeying the court order or being hauled into court to answer for damages." *Patterson v. Von Reisen*, 999 F.2d 1235, 1240 (8th Cir. 1993). To hold otherwise would require police officers and other court officials enforcing facially valid orders "to act as pseudo-appellate courts scrutinizing the orders of judges." *Id.* at 1289. Such a result is obviously untenable, *Mays v. Sudderth*, 97 F.3d at 113; *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1239 (7th Cir. 1986), and would unduly hamper law enforcement.

In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *U.S. v. Leon*, 468 U.S. 879, 921 (1984), *quoting in part, Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring).

A neutral and detached magistrate made a determination of probable cause in this case. The magistrate's determination is entitled to great deference, *U.S. v. Ishmael*, 48 F.3d 850, 857 (5th Cir. 1995), upon which officer Robinett was entitled to rely. Upon finding probable cause, the magistrate issued a search warrant commanding any peace officer of Wichita County, Texas, to conduct the search. Based on this command, officer Robinett's *only* duty was to duly execute the search warrant. TEX. CODE CRIM. PROC. art. 18.06(a).[1]

Assuming *arguendo* that every officer on the scene had an affirmative duty to second-guess the magistrate's determination of probable cause, a review of the supporting affidavit in accordance with the law is necessary. Both the United States and Texas constitutions provide that a search warrant must be based on probable cause supported by oath or affirmation. U.S. CONST. amend. IV; TEX. CONST. art. I, sec. 9. To support a search warrant, the affidavit must set forth facts which are sufficient to establish probable cause. *Mayfield v. State*, 800 S.W.2d 932, 934 (Tex. App. – San Antonio 1990, no writ).

Determination of whether the affidavit is sufficient to show probable cause is limited to the four corners of the affidavit. *Bell v. State*, 747 S.W.2d 898, 901 (Tex. App. – Ft. Worth 1988, writ ref'd.). An affidavit supporting a search warrant must be interpreted in a common sense manner, *State v. Cantu*, 785 S.W.2d 181, 183 (Tex. App. – Houston [14th Dist.] 1990, no writ), and the magistrate reviewing

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[1] "A peace officer to whom a search warrant is delivered shall execute it without delay and forthwith return it to the proper magistrate." TEX. CODE CRIM. PROC. art. 18.06(a).

the affidavit is entitled to draw inferences from the facts contained within the affidavit. *Casillas v. State*, 719 S.W.2d 585, 587-88 (Tex. Crim. App. 1989). When faced with a search warrant affidavit, a magistrate is not bound by such finely tuned standards as proof beyond a reasonable doubt or by a preponderance of the evidence. Rather, the sole concern is probability. *Rodriguez v. State*, 781 S.W.2d 946, 949 (Tex. App. – Dallas 1989, writ ref'd.). The task of the issuing magistrate is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

A determination of probable cause made by a detached and neutral magistrate should be paid great deference by reviewing courts. *Gates*, 462 U.S. at 326. Reflecting this preference for the warrant process, a reviewing court is not to conduct a *de novo* review, but simply ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Gates*, 462 U.S. at 238; *Rodriguez*, 781 S.W.2d at 948. The Fourth Amendment requires no more. *Bower v. State*, 769 S.W.2d 887, 902 (Tex. Crim. App. 1989).

Here, the affidavit for the search warrant was sworn by an officer of the Wichita Falls police department, Greg Burt. The affidavit states that the information was obtained from an informant, an unidentified third person, and police officers Al Chapa and Bob Talley. The affidavit states that officer Burt had probable cause to believe that on January 28, 1993, a controlled substance, marijuana,

was being held at 2142 Avenue E, Wichita Falls, Texas. This averment is supported by the following facts:

> On 01-27-93 a confidential informant, who for reasons of security shall remain unnamed, went to 2142 Ave E to purchase marijuana. The informant sent another person in to the house. The other person went in and gave the money supplied by the informant to a person known as Travis. Travis told the other person that he had to get the marijuana from 'Three Fingered Marvin'. Affiant knows 'Three Fingered Marvin' to be Marvin Wayne Adams. Travis left 2142 Ave E and walked out the back door to 1409 Fulton. This is directly behind 2142 Ave E. Both houses are painted the same color tan with brown trim. The informant saw Travis go to 1409 Fulton and then back to 2142 Ave E. As soon as Travis returned to 2142 Ave E, the person the informant sent in for the marijuana came back out and gave the marijuana to the informant. This person explained to the informant that Travis is in care and control of both 2142 Ave E and 1409 Fulton and that Travis allows Adams to live on Fulton in exchange for Adams holding most of the marijuana. Again on 01-28-93 Affiant sent the informant back to the same house. Again, the informant gave money to the same other person to go in and buy marijuana. The other person went in and gave the money to Travis and the informant saw Travis go out the back door of 2142 Ave E and go into 1409 Fulton. The informant saw Travis leave after a short time and go back to 2142 Ave E. As soon as Travis returned the other person came back out and gave the marijuana to the informant. The other person said Travis always had marijuana and to come back anytime.

> Affiant has received information in the past that this going [sic] on at this address. Officer Al Chapa has also received this information. Officer Bob Talley has received information in the past that this was going on at this address.
>
> Affiant has observed traffic consistent with marijuana dealing at this address. Affiant personally knows Marvin Adams and is aware of Adams' involvement in illegal drugs. Adams has been arrested for drug offenses in the past. The informant has proven to affiant the ability to recognize marijuana and the way it is packaged and sold. The informant is responsible for several felony arrests including but not limited to marijuana offenses. The informant has made these buys and observations within the last twenty four (24) hours.
>
> Affiant believes Travis is in possession of marijuana at 2142 Ave E and believes he will find marijuana there.

The cumulative weight of these facts is abundantly sufficient to show probable cause that marijuana would be found at 2142 Avenue E. Besides being supported by two drug purchases from "Travis" within the last 24 hours, this conclusion is strengthened by the fact that "Travis" had care and control of 2142 Avenue E and stated he "always had marijuana" and to "come back anytime." This, coupled with the fact that traffic was consistent with marijuana dealing and three police officers[2] received information that this address was a known

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[2] It is entrenched in Texas jurisprudence that police officers, as informers and affiants, implicitly are worthy of belief by a magistrate. *Wilkerson v. State*, 726 S.W.2d 542, 545

drug residence, support a magisterial conclusion of probable cause. Clearly, officer Robinett's reliance on the warrant was objectively reasonable. *See U.S. v. Leon*, 468 U.S. at 926 (even when an affidavit creates disagreements as to the existence of probable cause, the officer's reliance on a magistrate's determination of probable cause is objectively reasonable).

By comparison, the affidavit in this case is stronger and contains more factual information than either of the affidavits held sufficient in *Bodin v. State*, 782 S.W.2d 258 (Tex. App. – Houston [14th Dist.] 1989), *rev'd on other grounds*, 807 S.W.2d 313 (Tex. Crim. App. 1991) and *Salazar v. State*, 806 S.W.2d 291 (Tex. App. – Amarillo 1991, no writ). Both of those cases dealt with search warrants involving narcotics. The affidavit in *Bodin* contained two substantive paragraphs describing a controlled buy in an apartment by a reliable informant. The affidavit said nothing about narcotics being in the apartment when the police sought to search. Nevertheless, this affidavit passed constitutional muster upon appellate scrutiny. The affidavit in *Salazar* was much weaker. It contained one substantive paragraph describing a controlled buy two days earlier by an informant. The affidavit said nothing about the informant's reliability. Yet, it demonstrated probable cause. The affidavit here contains four paragraphs of substantive facts describing two controlled buys within 24 hours at the same location involving the same reliable informant responsible for several

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(Tex. Crim. App. 1986); *Towery v. State*, 499 S.W.2d 160, 163 (Tex. Crim. App. 1973); *Kolbert v. State*, 644 S.W.2d 150, 153 (Tex. App. – Dallas 1982, no writ).

prior felony arrests. This information alone, according to *Bodin* and *Salazar,* would support a finding of probable cause. But, the affidavit contains more. Three police officers had independently received information regarding drug activity at this address. And the affiant further observed vehicular traffic consistent with marijuana dealing at this address. All of this information points to the fact that marijuana would probably be found at 2142 Avenue E. Although Carlisle says that officer Burt's affidavit is a "bare bones affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable", the facts state otherwise.

There is a third equally compelling reason that qualified immunity cloaks officer Robinett in his reliance on the search warrant. The evidence. Officer Robinett authenticated a copy of the search warrant and testified in his affidavit that probable cause existed to enter the residence. This testimony is supported by the expert opinion of police chief Curtis Harrelson that officer Robinett acted within the acceptable, reasonable and lawful parameters of proper police training and conduct. Although Carlisle alleges that no officer could have relied on the search warrant, no evidence was offered to support this supposition.

D. The arrest was based on probable cause.

Not only was probable cause to search the premises established at the time the warrant was issued, it was still present when the police executed the warrant. Upon entering the residence, the officers were instantly faced with deadly force. A peace officer may arrest an offender

without warrant for any offense committed in his presence or within his view. TEX. CODE CRIM. PROC. art. 14.01(b). From the moment that Carlisle pointed his weapon at officer Robinett, Carlisle committed an aggravated assault on a peace officer. A warrantless arrest, as in this case, is constitutionally valid if the arresting officer had probable cause to make the arrest. *U.S. v. Lowery*, 436 F.2d 1171, 1174 (5th Cir. 1970). Probable cause is a cognizable defense to a §1983 arrest claim. *Howell v. Tanner*, 650 F.2d 610, 614 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982); *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). Probable cause is established if the officer had knowledge that would warrant a prudent person's belief that the person arrested had already committed or was committing a crime. *Duckett v. City of Cedar Park, Texas*, 950 F.2d 272, 278 (5th Cir. 1992). Because officer Robinett was present as the events unfolded and was the victim of the aggravated assault, undoubtedly, he had probable cause to arrest Carlisle. Carlisle claims, however, that, because the search warrant did not name him and specifically authorize his arrest, he could not be touched by the officers. (Petition at 14). Carlisle completely misses the point. He was not arrested pursuant to the warrant; he was arrested without warrant based on his illegal, potentially life-ending, conduct.

II. Carlisle's criminal convictions bar his civil claims under *Heck v. Humphrey*

Carlisle seeks to prove his arrest was unconstitutional. He argues that the entry was illicit because the

search warrant was invalid, no officer could have reasonably believed the warrant to be valid, and the police made a "no knock entry." These same issues were asserted without success in Carlisle's criminal trial and appeal. *Carlisle v. State*, No. 02-95-211-CR (Tex. App. – Fort Worth 1996). The Court is requested, pursuant to TEX. R. CIV. EVID. 201, to take judicial notice of these criminal proceedings. *Langdale v. Villamill*, 813 S.W.2d 187, 189-90 (Tex. App. – Houston [1st Dist.] 1991, no writ); *Bryan v. Blue*, 724 S.W.2d 400, 402 (Tex. App. – Waco 1986, no writ).

In *Heck v. Humphrey*, 512 U.S. ___, 114 S.Ct. 2364, 129 L.Ed. 2d 383 (1994), the Court broadly held that any §1983 claim which attacks the constitutionality of a conviction does not accrue until that conviction has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus". *Id.* at ___, 114 S.Ct. at 2372. The Court applied this rule further to hold that a §1983 claim, which alleges harm based upon conduct that would imply that the conviction is invalid, does not mature until the conviction has been lawfully set aside. *Id.* The embryonic nature of a §1983 claim was emphasized when the Court spoke of the claim as "not cognizable", and proclaimed that courts deny "the existence of a §1983 cause of action so long as the conviction stands undisturbed." *Id.* at ___, 114 S.Ct. at 2373.

A state prisoner, like Carlisle, may not challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. §1983. *Id.* at ___, 114 S.Ct. ___, 129 L.Ed. 2d 2382. In fact, a §1983 claim that falls under the rule in

Heck is considered legally frivolous. *Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996). To permit a convicted criminal to proceed with a civil rights claim would permit a collateral attack on the conviction through the vehicle of a civil suit. *Heck*, 512 U.S. at ___, 114 S.Ct. at 2382. As a matter of law, Carlisle cannot state a claim because Carlisle's convictions of aggravated assault of a peace officer and possession of a firearm by a felon constitute a final judgment on the matter, which bars this civil suit. *Wells v. Bonner*, 45 F.3d 90, 95-96 (5th Cir. 1995); *Jackson v. Vannoy*, 49 F.3d 175, 177 (5th Cir. 1995).

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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